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IN THE

Supreme Court of the United States

GREAT-WEST LIFE & ANNUITY INSURANCE CO., EARTH SYSTEMS, INC. and THE HEALTH AND WELFARE PLAN FOR EMPLOYEES AND DEPENDENTS OF EARTH SYSTEMS, INC.,

Petitioners,

v.

JANETTE KNUDSON and ERIC KNUDSON,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENT JANETTE KNUDSON

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I. SUMMARY

A. Procedural History.

After Petitioners Great-West Life & Annuity Insurance Company ("Great-West") and Earth Systems Inc. ("Earth Systems") refused to litigate their reimbursement rights in State Court under concurrent jurisdiction pursuant to 29 U.S.C. § 1132(a)(1)(B), 29 U.S.C. § 1132(e)(1),[1] Petitioners then served Janette Knudson with their First Amended Complaint in federal district court ("District Court"). After discovery was completed Petitioners moved for summary judgment, whereupon Respondent Janette Knudson filed a cross motion for summary judgment. The District Court granted Janette Knudson's motion for summary judgment and denied Great-West's motion for summary judgment. The District Court's decision was based upon the application of ERISA legal principles. The Ninth Circuit then affirmed but on other grounds.

B. The ERISA Plan Reimbursement Language.

The Plan contained a provision which limited the reimbursement a participant owed to the ERISA Plan. It stated in relevant part:

---

1. Knudson filed and served a Notice of Hearing and Petition and as described on page 7, which in part was to determine Knudson's lien rights and obligations utilizing federal law under ERISA. Great-West refused to participate in the State Court proceedings. It mistakenly assumed that only federal district courts were empowered to determine the amount of the lien. This assumption lead to a multiplicity of lawsuits. This issue is discussed beginning on page 11, *infra*.

* * *

The lien will not exceed:

• the amount of benefits paid under this **Booklet** for the treatment of the Loss; or

• the amount received by the **Covered Person** for such medical treatment from the third party.

* * *

(J.A. 58-59, bold in original.)

C. Great-West Sues Janette Knudson.

Great-West's first amended complaint was premised on two novel principles. First, that Great-West (not the Plan) could, without any authority and without following procedures mandated by ERISA, unilaterally rewrite the reimbursement provision by sending Janette's estranged husband, Eric Knudson, a letter threatening cessation of payments for necessary medical services unless an adhesive right to recovery agreement was signed. (J.A. 212-213.) The terms of the adhesive right to recovery agreement unfairly modified the beneficiaries duties owed to the Plan. (J.A. 229.)[2]

2. Great-West is a stop loss insurer for the Plan. It explicitly was *prohibited* from: interpreting the language of the Plan, performing any discretionary duties and acting as a fiduciary. (J.A. 28 Article IV.) Clearly, Great-West had no authority under ERISA principles to threaten cessation of medical services unless an adhesive right to recovery agreement was signed by the beneficiary. (J.A. 245-246.)

After this lawsuit was filed, on August 20, 1997 the Plan trustee Jerol Brown attempted *ex post facto* through his interpretation to rewrite the Plan document in order to delete provisions which Brown disfavored. (J.A. 245-247.) Brown admitted that he did not like the provision in the reimbursement clause which limited the amount of recovery to those past medical expenses which were reimbursed from a third party. Brown under his interpretation ignored "limitation" term included in the Plan. (J.A. 246-247.) (K.E.R. Docket 54 at 152-153, 156.)[3]

D. The Outcome Of The Lawsuit At District Court.

The District Court found that the Plan administrator's interpretation was arbitrary and capricious. The District Court also found that Great-West did not have the authority, nor did it receive consideration for attempting to rewrite reimbursement provision of the Plan in the letter and the right to recovery agreement that it forced upon Eric Knudson in 1992. (J.A. 228-229.) The District Court expressly found that both of these actions were arbitrary and capricious and were to be disregarded. (J.A. 228-229.)

* * *

Based on Mr. Brown's interpretation, Great-West, the Plan, and Earth Systems seek to recover all of the $411.157.11 for Defendant's settlement with Hyundai. An interpretation of a plan which imposes additional terms which clash with the terms of a plan is considered arbitrary and

3. K.E.R. refers to Knudson Excerpt of Record filed at the Ninth Circuit Court of Appeals.

capricious. [*Canseco v. Construction Laborers Pension Trust for Southern California*, 93 F.3d 600, 606 (9th Cir. 1996).] Mr. Brown's interpretation of the Plan clashes with the terms of the Plan. A reviewing court should not defer to an interpretation of the Plan that is flawed. *Atwood v. Newmont Gold Co., Inc.* 45 F.3d 1317, 1323 (9th Cir. 1995).

The terms of the Plan are abundantly clear in providing for a first lien and limits of reimbursement. Under the facts of the present case, the Plan is limited to recovering no more than the amount of benefits paid out or the amount received from a third party for medical treatment. . . .

(J.A. 246-247.)

E. Great-West Attacks The Jurisdiction Of Its Own Case After Losing in District Court.

For the first time on December 8, 1998 in its opening brief before the Ninth Circuit Great-West challenged the ERISA jurisdiction of its own lawsuit by raising the issues framed in *FMC Medical Plan v. Owens*, 122 F.3d 1258 (9th Cir. 1997). It should be noted that Great-West failed to raise the *FMC* issue (during pendency of the District Court action) although *FMC* was decided on August 25, 1997.[4]

The Ninth Circuit affirmed the District Court decision primarily based upon the absence of subject matter

4. This raises additional equitable issues for consideration.

jurisdiction. However, the Ninth Circuit in footnote 5 stated that, "For our purposes . . . the dismissal could be based either on lack of subject matter jurisdiction or on the merits." (J.A. 253.)

II. STATEMENT

Janette Knudson was driving a Hyundai in June 1992 when the car went off Interstate 5 at seventy five (75) miles per hour and rolled over several times. (J.A. 145-147.) She instantly became a quadriplegic. (J.A. 147.) Janette Knudson is solely responsible for raising her nine (9) year old daughter, Jenna. (J.A. 112-114.)

The Plan's Right to Recovery provision limited Great-West's lien to amount received for past medical treatment. It states in pertinent part:

RIGHT OF RECOVERY

We will, at our sole option, have the right to recover from the **Covered Person** any payment for benefits paid for treatment of such Loss under this **Booklet** which the **Covered Person** is entitled to receive from a third party. We will have a first lien upon any recovery, whether by settlement, judgment or otherwise, the **Covered Person** receives from:

- the third party; or
- the third party's insurer or guarantor; or
- the **Covered Person's** uninsured motorist insurance.

This lien will *not* exceed:

- the amount of benefits paid under this **Booklet** for the treatment of the **Loss**; or

- the amount received by the **Covered Person** for such medical treatment from the third party.

(J.A. 58-59. Bold in original, italics added.)

Both the State Court *and* the District Court interpreted this language in support of Janette Knudson's position that the lien amount was limited to the amount received for past medicals. Both courts ruled in Janette Knudson's favor based upon the merits of the case. The District Court held that a plan administrator cannot ignore a provision of the Plan which limits recovery. (J.A. 228-229.) Thus, when Great-West ignored the express limit on the recoverable lien, the District Court held that Great-West acted arbitrarily and capriciously. (J.A. 246-247.)

Great-West without authority attempted to modify the ERISA Plan to the detriment of the beneficiary when it sent a letter with the right to recovery agreement to Eric Knudson. The right to recovery agreement altered the terms of the Plan *ex post facto*. This action was impermissible. (J.A. 245-246.) The right to recovery agreement did not limit the lien to the amount received by the covered person for such medical treatment. (J.A. 77-78.)

On June 3, 1993, Janette Knudson sued Hyundai Motors of America and others in Superior Court for the County of Los Angeles, State of California ("Knudson I"). Great-West was notified of the lawsuit in 1993.

On March 26, 1997, Janette Knudson served Petitioners with Notice of the Application for Approval of a Conditional Settlement and for the Establishment of the Janette Knudson Special Needs Trust and to satisfy the amounts of the liens by Great-West and Medi-Cal.[5] (J.A. 232-236.) The application before the State Court included the Summary Plan Description and the right to recovery language. Respondent Janette Knudson requested an interpretation of the Summary Plan Description to determine the amount of the lien owed to Great-West. (J.A. 145-166, 112-138.) Petitioner had the right to intervene in State Court, pursuant to California Code of Civil Procedure § 387. Petitioners did not intervene or oppose the State Court but instead removed the action to District Court. (J.A. 167-169.)

On June 30, 1997, the District Court remanded the action entitled, *Great-West Life & Annuity Ins. Co. v. Knudson, et al.*, Case No. CV 97-2801 JMI (JGx) ("Knudson II"), advising Great-West that the State Court could fairly adjudicate Respondent Janette Knudson's lien obligations. (J.A. 171-175.)

On July 3, 1997, Respondent Janette Knudson again served both Great-West and Earth Systems with the Petition for an Order to Approve a Conditional Settlement Agreement, Order directing the net money to be paid to the Janette Knudson Special Needs Trust, as authorized by California Probate Code § 3601 including the determination of lien rights. The notice of hearing was set for July 23, 1997. (J.A. 233-234.)

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5. The parties have stipulated that service was proper for all of the hearings discussed herein. (J.A. 232-236.)

On July 8, 1997, Petitioners served Respondent Janette Knudson with its verified First Amended Complaint in this case, case no. CV 97-3745 JMI(JGx) ("Knudson III"), plus Petitioners' application for a temporary restraining order and other moving papers. (J.A. 87-95.) The temporary restraining order was denied on July 9, 1997. (J.A. 96-99.)

On July 23, 1997, the State Court reviewed the ERISA Plan, including the right to recovery language in the Plan and Great-West's lien claim of $411,157.11. The court evaluated the limited settlement funds available in relation to the proportion of the past medicals recovered, the present value of future medical expenses, ($2,593,900.00) the past loss of earnings, and the present value of the future loss of earnings ($819,829.00) as well as the loss of enjoyment of life for the single mother who is a quadriplegic. The Court approved Great-West's lien at $13,828.70. (J.A. 139-166.) The State Court adjudicated the issues finding that the settlement was fair given the complex and contested liability issues which caused Janette Knudson to accept a compromise settlement that only minimally compensated her for her catastrophic injuries. (J.A. 139-144.) The Court authorized the establishment of the Janette Knudson Special Needs Trust pursuant to California Probate Code § 3604. (J.A. 139-144.) The Special Needs Trust is an irrevocable trust.

On August 1, 1997, Knudson served the order both on Great-West and on Earth Systems. (J.A. 234.) Petitioners failed to appeal or move to set aside the Order. Pursuant to the Court order, Janette Knudson transmitted the funds to Great-West on August 21, 1997. (J.A. 235.) As ordered by the Court, Defendant Hyundai directly funded the Janette Knudson Special Needs Trust. (J.A. 235.)

Thereafter, discovery in the underlying District Court litigation ensued. On May 14, 1998, after discovery and after numerous motions were argued, the District Court granted Janette Knudson's cross-motion for summary judgment based upon the Court's interpretation of the Plan's right to recovery language. (J.A. 237-249.)

On May 18, 1998, the court entered the written order adopting the statement of uncontroverted facts and conclusions of law. (J.A. 210-230.) The District Court stated:

* * *

> An interpretation of a plan which imposes additional terms which clash with the terms of a plan is considered arbitrary and capricious. (Citation.) Mr. Brown's interpretation of the Plan clashes with the terms of the Plan. A reviewing Court should not defer to an interpretation of the Plan that is flawed. *Atwood v. Newmont Gold Co. Inc.*, 45 F.3d 1317, 1323 (9th Cir. 1995).

(J.A. 246.)

On August 7, 1998, Great-West appealed the granting of summary judgment and attorney fees to the Ninth Circuit.

The Ninth Circuit Court of Appeals affirmed and based its holding on other grounds which presents the issues that are now before this Court.

III. ARGUMENT

A. Janette Knudson's Interest In This Appeal.

Janette Knudson is a quadriplegic and single mother who has no funds. The recovery from the underlying case was distributed: (1) according to the terms of an ERISA Plan; (2) pursuant to the order of the State Court; and (3) pursuant to the judgment of the District Court. Janette Knudson received no funds, a special needs trust was properly established pursuant to California Probate Code § 3604 *et seq*. due to the compromise nature of the recovery. The recovery was a small percentage of the total damage suffered by Janette Knudson. (J.A. 139-160.)

B. There Was A Separate And Independent Basis For The District Court's Granting Of Summary Judgment In That The Plan Administrator's Interpretation Was Arbitrary And Capricious.

Summary judgment in favor of Janette Knudson was granted on the merits of the case. Therefore, independent of the subject matter jurisdiction question, Great-West was not entitled to ignore the terms of the Plan which were properly interpreted by both Superior Court and by the District Court.

Petitioners infer that the District Court in this case failed to accept subject matter jurisdiction over this ERISA case. They are wrong. The District Court granted summary judgment in favor of Respondent Janette Knudson based upon the merits of her case and upon its interpretation of the ERISA Plan. (J.A. 210-236.) Petitioners infer that Great-West could not have been a party to the State Court action. Again, Petitioners are wrong. California Code of Civil Procedure § 387 allows for intervention by any party having an interest in the litigation.

C. Public Policy And Equity Demands Avoiding Multiplicity Of Lawsuits.

Public policy must promote efficiency in litigation to avoid multiplicity of actions. Further, a plaintiff in any tort case must have the right to settle a lawsuit in a context that allows her to have full understanding of proceeds that will be forthcoming after deductions for attorney fees, liens, and costs.

Knudson's service of the petition to compromise invoked concurrent jurisdiction on State Court to hear the matter pursuant to 29 U.S.C. § 1132(a)(1)(B). Great-West and Earth Systems had notice of Knudson's intent to adjudicate her claim that any claimed reimbursement in excess of the lien limitation language was prohibited by the terms of the Plan. This petition was filed and served on two different occasions, both before removal to and after remand by the District Court, therefore, providing Petitioners two separate opportunities in which to appear in order to protect their reimbursement claim or lien interest under the terms of the Summary Plan Description. Great-West and Earth Systems failed to act on either occasion. Equitable principles which underpin Petitioner's argument fail under factual scrutiny.

In this case Knudson desired to fulfill her obligations to the ERISA Plan in a fair manner. Accepting Great-West's argument that only a federal court can hear claims of reimbursement is disastrous. This procedure will always require the multiplicity of lawsuits and such a holding would create uncertainty for a plaintiff. The uncertainty will undoubtedly promote more litigation, fewer settlements and finally, less reimbursement for ERISA plans.

D. Equitable Principles Require That Reimbursement To A Plan Be Based On A "Common Fund" Theory.

It is well settled under federal law with respect to personal injury cases involving Medicare that the "common fund" rule is followed. Great-West's suggestion that it is entitled to a full recovery of all expenditures is unsupportable in equity. The government when Medicare pays for hospitalization benefits for an individual injured by a tortfeasor shares in the cost of obtaining a recovery against the tortfeasor. 42 C.F.R. § 411.37(a)(1)(i)(ii). Similarly, in California Medi-Cal liens are reduced under the common fund theory pursuant to statute. Cal. Welf. & Inst. Code § 14124.71 *et seq.* (West. 2001)

The foregoing considerations make it imperative that this Court consider adopting a procedure in equity which provides the Plan the opportunity to resolve its claims in State Court utilizing federal law in the underlying personal injury action, and yet allows the ERISA beneficiary to be protected in an equitable manner in situations when a full recovery is not forthcoming.

Thus, the rule of law that under the equitable principles of ERISA should allow for reimbursement in a fair manner which discourages multiplicity of lawsuits and yet treats both ERISA plans and their beneficiaries fairly under a "common fund" theory.

E. Equitable Remedies Must Apply To Janette Knudson.

Due to the arguments previously advanced earlier in her Opposition to the Writ of Certiorari and in her Motion to Dismiss, Respondent Knudson respectfully defers to the Brief of Amicus Curiae by Invitation on the issues of "appropriate equitable relief" and "subject matter jurisdiction."

In the event that this Court affirms the legal theories on which Janette Knudson prevailed in District Court then directions to the Ninth Circuit are necessary. Therefore, Janette Knudson requests that this Court protect her welfare if it determines that the Ninth Circuit's reliance upon *FMC v. Owens*, 122 F.3d 1258 (9th Cir. 1997) is erroneous. In such an event Janette Knudson requests that:

a. This Court determines that the District Court had jurisdiction to grant her cross-motion for summary judgment and the relief it afforded her, including attorneys fees;

b. Great-West must be precluded from re-litigating the District Court's summary judgment order, findings of fact and conclusions of law since this Court has reviewed a procedural issue; and

c. No costs or fees be awarded against Janette Knudson on this appeal.

IV. CONCLUSION

Based on the foregoing, Respondent Janette Knudson requests that this Court affirm the ruling of the Ninth Circuit or alternatively remand this matter to the Ninth Circuit with specific instructions to approve the factual determinations of the District Court which were not reviewed by this Court.

Respectfully submitted,

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